UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FRANCISCO GARCIA individually, on behalf of his minor child SILVARIO GARCIA and all others similarly situated Plaintiff(s), vs. MICROSOFT CORPORATION Defendant.	)	Case No. 1:07-CV-2363 TCB

DEFENDANT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

I. INTRODUCTION

Defendant Microsoft Corporation ("Microsoft") submits this memorandum of law in opposition to Plaintiff's Motion to Remand. As shown below, neither of Plaintiff's two proffered bases for remand has any merit.

First, Plaintiff argues that Microsoft has not shown that any of the proposed class members have claims in excess of $75,000, the jurisdictional amount that the

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Class Action Fairness Act ("CAFA")[1] requires in a "mass action." Pl. Mem. at 5-6. But this case is not a "mass action;" instead, it is brought as a class action and thus under CAFA the $75,000 requirement is inapplicable. In class actions, all that is required is that the *aggregated* amount in controversy of all of the proposed class members exceeds $5 million. Plaintiff's argument that Microsoft does not satisfy the $75,000 requirement for individuals in a "mass action" is irrelevant to whether there is federal jurisdiction over *this case*.

Second, Plaintiff argues that Microsoft has not satisfied CAFA's $5 million aggregated jurisdictional-amount requirement. Plaintiff is incorrect. As shown in the Declaration of Jackie Reinland that Microsoft submits with this memorandum, Microsoft's records establish that the aggregated amount in controversy exceeds $5 million. And as explained below, Plaintiff's attempt to pre-empt the introduction of that evidence, which Microsoft already alleged in its Petition for Removal, is without legal foundation.

Microsoft demonstrates in this memorandum that this proposed class action satisfies CAFA's aggregated $5 million requirement, as well as each of the other requirements for federal jurisdiction. The Court should accordingly deny

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[1] Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005), codified in scattered sections of Title 28 of the United States Code.

Plaintiff's Motion to Remand.

II. PROCEDURAL HISTORY AND FACTS

A. Facts

On August 23, 2007, Plaintiff Francisco Garcia, on behalf of his minor child Silvario Garcia, commenced this action in Fulton County Superior Court. Plaintiff served the Complaint on Microsoft on August 29, 2007. In his Complaint, Plaintiff alleges that on or about October 2005, his minor child Silvario used Plaintiff's debit card to purchase a one-year subscription to Microsoft's Xbox LIVE interactive gaming service. Compl. ¶ 8. According to the Complaint, the subscription was automatically renewed for a second one-year term on or about October 2006. *Id.* ¶ 9. Microsoft refunded Plaintiff's subscription fee for the second one-year term on or about October 6, 2006. *Id.* ¶ 11.

B. Plaintiff's Claims

Plaintiff makes three substantive claims. First, Plaintiff alleges that Microsoft "fraudulently induced a contractual relationship for XBOX Live [sic] services with" his son Silvario, by charging subscription fees "while knowing, upon information and belief, that such initial XBOX Live [sic] subscriptions contracts are unenforceable against minor Class Members pursuant to the well-established 'Infancy Doctrine,' found in O.C.G.A. §13-3-20, wherein contracts with minor children are unenforceable." Compl. ¶ 24.

Second, Plaintiff makes the same allegations of fraudulent inducement and unenforceability with regard to the automatic renewal of the Xbox LIVE contract in October 2006. Compl. ¶ 25.

Third, Plaintiff claims that his "multiple-year" contract is unenforceable for violation of the Statute of Frauds, O.C.G.A. § 13-5-30(5), because it was allegedly not in writing. Compl. ¶ 26. Plaintiff alleges claims for fraudulent inducement, conversion, fraud and deceit, deceptive trade practices, unjust enrichment, attorney's fees, and punitive damages. Compl. ¶¶ 23-58.

Plaintiff seeks to litigate his case as a class action on behalf of two proposed classes. First, Plaintiff seeks to represent "all others similarly situated . . . who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying automatic XBOX Live [sic] subscription renewals of any length, where such contracts have been entered into by *minor children* in violation of O.C.G.A. §13-3-20." Compl. ¶ 13 (emphasis added).

Second, Plaintiff seeks to represent "all others similarly situated who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying automatic XBOX Live [sic] subscription renewals of any length, where such multiple-years contracts with *adult* Class members are not in writing as required under the applicable Statute of Frauds, found in O.C.G.A. §13-5-30(5)." Compl. ¶ 14 (emphasis added).

C. Microsoft's Petition For Removal

On September 27, 2007, Microsoft timely removed the Complaint to this Court under 28 U.S.C. § 1441(a) and CAFA. In its removal petition, Microsoft identified the specific reasons why this case satisfies all of the requirements for federal jurisdiction under CAFA and 28 U.S.C. § 1441. Specifically, Microsoft stated that its records of Xbox LIVE subscriptions establish that (a) there are more than 100 proposed class members; (b) the Complaint satisfies CAFA's minimal-diversity requirement because at least one proposed class member – for example Plaintiff, a citizen of Georgia – is a citizen of a different state from Microsoft, which is a Washington corporation with its principal place of business in Washington; and (c) Microsoft's records of Xbox LIVE subscriptions show that Microsoft received more than $5 million in revenue from Xbox LIVE subscriptions with subscribers in Georgia for subscriptions with automatic renewal provisions where the original term and the automatic renewal term together exceeded one year.

On October 2, 2007, Plaintiff moved to remand, arguing that the "aggregate amount in controversy for this case does not satisfy the $5 million threshold required under CAFA, and arguably, the $75,000 individual threshold requirement of CAFA is also not met." Pl. Motion at 2.

As shown below, Plaintiff's arguments against removal are without merit.

II. ARGUMENT

A. Plaintiff's Argument That At Least One Proposed Class Member Must Have $75,000 In Controversy Is Wrong Because That "Mass Action" Requirement Has No Application In Class Actions.

Plaintiff argues that Microsoft must prove by a preponderance of the evidence that the claim of at least one member of the proposed class exceeds $75,000. Pl.'s Motion to Remand at 2 (citing *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007); *Abrego Abrego v. Dow Chemical Co.*, 443 F.3d 676 (9th Cir. 2006)). Plaintiff is wrong. The $75,000 amount-in-controversy requirement Plaintiff cites applies in what CAFA defines as "mass actions," a term that expressly excludes class actions such as the present case.

CAFA defines a "mass action" as:

> any civil action *(except a civil action within the scope of section 1711(2))* in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under subsection (a).

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added). The reference to "subsection (a)" at the end of section 1332(d)(11)(B)(i) is to 28 U.S.C. § 1332(a), the basic

provision defining federal jurisdiction which includes the familiar $75,000 amount-in-controversy requirement:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between--
>
> > (1) citizens of different States;
> > (2) citizens of a State and citizens or subjects of a foreign state;
> > (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
> > (4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a).

However, by expressly excluding "civil action[s] within the scope of section 1711(2)," CAFA, in section 1332(d)(11)(B)(i), removed class actions such as this case from both the "mass action" category and the application, through section 1332(d)(11)(B)(i), of section 1332(a)'s amount-in-controversy requirement. Specifically, 28 U.S.C. § 1711(2) provides that:

> The term "class action" means any civil action filed in a district court of the United States under rule 23 of the Federal Rules of Civil Procedure or any civil action that is removed to a district court of the United States that was originally filed under a State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representatives as a class action.

28 U.S.C. § 1711(2); *see also Lowery*, 483 F.3d at 1195 n.27 ("By its own terms, [section 1332(d)(11)(B)] defines mass action specifically to exclude formal class

actions brought under Fed.R.Civ.P. 23 or analogous state rules or statutes. § 1332(d)(11)(B) (citing, as an exception from the 'mass action' definition, any 'class action' defined by 28 U.S.C. § 1711(2)).”). The present case was brought under Georgia's class action statute, O.C.G.A. § 9-11-23, so it is a class action within the meaning of section 1711(2) and thus excluded from the definition of "mass action" in section 1332(d)(11)(B)(i).

Finally, with regard to class actions, CAFA, as codified at 28 U.S.C. § 1332(d)(2), sets jurisdictional requirements different from section 1332(a). That is, for class actions:

> The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs, and is a class action in which--
>
>> (A) any member of a class of plaintiffs is a citizen of a State different from any defendant;
>> (B) any member of a class of plaintiffs is a foreign state or a citizen or subject of a foreign state and any defendant is a citizen of a State; or
>> (C) any member of a class of plaintiffs is a citizen of a State and any defendant is a foreign state or a citizen or subject of a foreign state.

28 U.S.C. § 1332(d)(2).

As a class action, this case is simply not subject to the $75,000 amount-in-controversy requirement of section 1332(a) that CAFA applies to mass actions – a category that expressly excludes class actions. Rather, it falls under the $5,000,000 aggregated amount-in-controversy requirement in section 1332(d)(2). Indeed, both of the cases on which Plaintiff relies for his $75,000 argument – *Lowery* and *Abrego* – were *mass actions*, *see Lowery*, 483 F.3d at 1189; *Abrego*, 443 F.3d at 678, not class actions. The discussion in those cases of the $75,000 requirement simply has no application here.

In sum, there is no basis to apply section 1332(a)'s $75,000 amount-in-controversy requirement in this case. Plaintiff's argument that the case is subject to remand for failure to satisfy section 1332(a) is without merit.

B. Federal Jurisdiction Exists Over This Class Action Because The Proposed Class Members' Claims Exceed $5 Million On An Aggregated Basis.

1. The Matter In Controversy Exceeds $5 Million.

Under 28 U.S.C. § 1332(d)(2), the Court has jurisdiction over this proposed class action if "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interest and costs . . . ." Plaintiff purports to sue "individually and on behalf of all others similarly situated who have been charged fees for XBOX Live [sic] subscriptions of any length, with accompanying automatic XBOX Live [sic] subscription renewals of any length, where such multiple-years contracts with adult Class Members are not in writing . . . ." Compl. ¶ 14. Plaintiff sues for compensatory and other damages, to recover the fees that the proposed class members paid Microsoft for their Xbox LIVE subscriptions, which Plaintiff alleges Microsoft "fraudulently procure[ed]." Compl. ¶ 50.

Here, the amount in controversy exceeds $5 million, exclusive of interest and costs, and thus satisfies the aggregated amount-in-controversy requirement of section 1332(d)(2). As set forth in the Declaration of Jackie Reinland, the Senior Finance Manager for Microsoft's Xbox LIVE unit, there are two Xbox LIVE annual subscription programs that, after one year, automatically renew for another one-year term. *See* Declaration of Jackie Reinland ¶¶ 8-9, attached hereto as Exhibit A (identifying "XBX-10095 Yearly Xbox LIVE Basic Subscription" and "XBX-11466 XBox360 Annual Gold Xbox LIVE Basic Subscription"). Both of those subscription plans therefore create "multiple-years contracts" that qualify under the class definition in paragraph 14 of Plaintiff's Complaint.

As explained in paragraphs 6 and 14 of the Reinland Declaration, between August 2002 and September 27, 2007, the date Microsoft removed this action, 80,850 subscriptions with Georgia addresses were opened in these two Xbox LIVE subscription programs.[2] Microsoft's revenue from these subscriptions through

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[2] The amount in controversy is determined as of the date of removal. *See Sierminski v. Transouth Financial Corp.*, 216 F.3d 945, 949 (11th Cir. 2000) ("We

September 27, 2007 was $5,231,106.51. Reinland Decl. ¶ 15. Section 1332(d)(1) requires that the amount in controversy exceed $5 million, exclusive of interest and costs. That requirement, and all other requirements for federal jurisdiction, including that there be at least 100 proposed class members, 28 U.S.C. § 1332(d)(5)(B), are satisfied here. The Court should accordingly deny Plaintiff's Motion to Remand.

2. Plaintiff's Argument That Microsoft Is Barred From Offering Evidence Of The Amount In Controversy Is Without Foundation.

In his Motion to Remand, Plaintiff argues that Microsoft is barred from submitting any evidence of the amount in controversy with its memorandum in opposition to remand. Rather, Plaintiff contends that under *Lowery*, *supra*, the Court is limited to reviewing the Complaint and the Notice of Removal when determining if a case satisfies the requirements for federal jurisdiction. Specifically, Plaintiff contends that the Court may not consider a declaration submitted in response to a motion to remand to provide admissible evidence of the

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emphasize, as did the court in *Allen*, that 'under any manner of proof, the jurisdictional facts that support removal must be judged at the time of the removal, and any post-petition affidavits are allowable only if relevant to that period of time.'") (quoting *Allen v. R&H Oil Co.*, 63 F.3d 1326, 1335) (5th Cir. 1995)). For removal purposes, the amount in controversy is determined without respect to any applicable statutes of limitation. *See Miedema v. Maytag*, 450 F.3d 1322, 1332 n.9 (11th Cir. 2006).

facts that Microsoft alleged in the Notice of Removal conferring federal jurisdiction. As shown below, Plaintiff's position is without foundation. To the contrary: (a) Microsoft made well-pleaded allegations of federal jurisdiction based on a good-faith investigation of its records; (b) the amount in controversy can be readily determined, taking this case out of *Lowery*; (c) as a panel opinion, *Lowery* did not overrule well-established Eleventh Circuit precedent that the defendant may submit evidence of jurisdiction with its brief opposing remand; (d) district courts, after *Lowery*, continue to receive such evidence after the notice of removal has been filed; and (e) Plaintiff's suggestion that the Court may not consider evidence from sources other than Plaintiff would undermine Congress' intent in enacting CAFA

a. Microsoft Made Well-Pleaded Allegations Establishing Federal Jurisdiction.

In its Notice of Removal, Microsoft made two well-pleaded allegations establishing the existence of federal jurisdiction over a class action under CAFA. First, Microsoft stated that based on a review of its records, there are at least 100 proposed class members. *See* Notice of Removal ¶ 7. The facts recited in that statement are proved in the Microsoft records attached as Exhibit A to the Reinland Declaration. Second, Microsoft stated that based on a review of its records, the proposed class members paid Xbox LIVE fees in excess of $5 million, thus establishing that the amount in controversy exceeds the $5 million jurisdictional threshold, exclusive of interest and costs. *See* Notice of Removal ¶¶ 10-11. That statement as well is proved in Exhibit A to the Reinland Declaration.

Microsoft thus alleged the requirements of class size and amount in controversy by stating, on good faith after investigation, that its records establish the existence of federal jurisdiction over this case. *See Lowery*, 483 F.3d at 1216 (noting that party invoking federal jurisdiction must make factual allegations sufficient under Fed. R. Civ. P. 8(a) and satisfying a party's good-faith obligations under Fed. R. Civ. P. 11). This is a completely different situation from *Lowery*, where the defendants alleged no facts in their removal notice to show federal jurisdiction. Rather, in *Lowery*, property owners brought a "mass action" arising out of the alleged discharge of pollutants into the atmosphere and ground water. *Lowery*, 483 F.3d at 1187. Not only did the plaintiffs allege no facts from which federal jurisdiction could be inferred, but the removing defendants did not either. *Id.* at 1217.

As the Eleventh Circuit observed, the defendants' notice of removal in *Lowery* provided no more than conclusory allegations that the amount in controversy exceeded the jurisdictional threshold. The notice said only that "Plaintiffs' claims exceed $5,000,000 in the aggregate and each individual claim exceeds $75,000." *See* Notice of Removal, *Lowery v. Honeywell Int'l Corp.*, No. 06-01370-CV-2-WMA (N.D. Ala. filed July 17, 2006) at ¶ 10, attached hereto as Exhibit B. Indeed, the *Lowery* defendants, having provided no facts to support their barebones assertions, sought to take discovery to support them. *Lowery*, 483 F.3d at 1215.

Under these circumstances, the Eleventh Circuit concluded that "[t]he defendants' request for discovery is tantamount to an admission that the defendants do not have a factual basis for believing that jurisdiction exists. The natural consequence of such an admission is remand to state court." *Id.* at 1217-18. Because the defendants removed the case without any factual basis to support their conclusory allegations, the *Lowery* court held that the district court was not authorized to receive evidence to salvage the deficient notice of removal. *Id.*

Here, Microsoft made good-faith allegations, after investigation, that based on its records, the requirements for jurisdiction under CAFA are present. Microsoft stated facts that meet the jurisdiction requirements. Far from requesting discovery in a belated effort to see *whether* there is evidentiary support, Microsoft submits in the Reinland Declaration the very records on which it based its allegations in its Notice of Removal.

b. The Amount In Controversy Can Be Readily Determined From The Claims And The Defendant's Contract Records.

The Eleventh Circuit in *Lowery* noted that a district court may go beyond the removal notice where there is a clear source, such as a contract, from which the amount in controversy may be determined:

> A defendant would be free to introduce evidence regarding damages arising from a source such as a contract provision whether or not the defendant received the contract from the plaintiff. In such situations, the underlying substantive law provides a rule that allows the court to determine the amount of damages. For example, in contract law, the default measure of damages is expectation damages; a court may look to the contract and determine what those damages would be. By contrast "[w]here the law gives no rule, the demand of the plaintiff must furnish one."

Lowery, 483 F.3d at 1214 n.66 (quoting *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182 (1936)).

Here, every member of the proposed classes was assessed Xbox LIVE subscription fees under a contract with Microsoft, and it is the sum of those fees that is reflected in the aggregated total reported in paragraph 15 of the Reinland Declaration. While Plaintiff does not assert a contract claim, his core allegation in each of his causes of action is that the subscription agreements of the proposed class members are unenforceable, *i.e.*, that Microsoft had no legal entitlement to the fees that the proposed class members paid. That Plaintiff intends to measure damages at least in part by reference to the subscription fees paid to Microsoft is confirmed in his Motion to Remand, where he states that "the Complaint shows typical damages for each putative class member being around $84," Pl. Mot. at 7 n.2, the sum of the $49.99 subscription fee and the $35 overdraft fee that he claims his bank assessed him, Compl. ¶¶ 8 & 10. Under *Lowery*, Microsoft is free to introduce evidence of the amount of the fees under the class members' Xbox LIVE subscription contracts to support removal. The Reinland declaration is just such straightforward evidence.

c. *Lowery* Did Not Overrule Eleventh Circuit Precedent Authorizing District Courts To Receive Evidence Of Federal Jurisdiction After The Filing Of A Notice Of Removal

In *Sierminski v. Transouth Financial Corp.*, 216 F.3d 945, 949 (11th Cir. 2000), the Eleventh Circuit announced that "[w]e align ourselves with our sister circuits in adopting a more flexible approach, allowing the district court when necessary to consider post-removal evidence in assessing removal jurisdiction." In *Sierminski*, the Eleventh Circuit held that post-petition affidavits are permissible as long as they reflect facts in existence at the time of removal. *Sierminski*, 216 F.3d at 949 (citing cases). The facts recited in the Reinland Declaration are clearly permissible under this binding standard, as they are facts that were in existence – and that Microsoft alleged – when removing this case.

In fact, the submission of evidence after the Notice of Removal is an efficient practice, widely followed in the district courts of this and other circuits. Plaintiff is correct that *Lowery* contains some language that appears to contradict the rule regarding post-notice evidence set forth in *Sierminski*. However, to bar Microsoft from submitting the Reinland Declaration would not only ignore the very different facts on which *Lowery* rests, *see supra* Sections II.B.2.a and II.B.2.b, it would also violate the Eleventh Circuit's binding rule regarding resolution of intra-circuit conflicts. Under that rule, "[w]here an intracircuit conflict of law exists, the earliest panel opinion is controlling." *Leonard v. Enterprise Rent A Car*, 279 F.3d 967, 973 (11th Cir. 2002).

Here – even assuming *arguendo* that *Lowery* is actually inconsistent with *Sierminski* – it is *Sierminski* that is controlling because both are panel opinions and *Sierminski* was decided first. Because *Lowery* was decided by a panel of the Eleventh Circuit and not *en banc*, it cannot be read to overrule *Sierminski* and bar the reception of evidence submitted after a defendant files it notice of removal.[3]

[3] There are additional Eleventh Circuit cases besides *Sierminski* that similarly authorize the consideration of evidence submitted after the notice of removal. Those opinions, which are consistent with *Sierminski*, remain good law for the same reason: as a panel opinion, *Lowery* cannot overrule them. Thus in *Williams v. Best Buy Co.*, 269 F.3d 1316 (11th Cir. 2001), the Eleventh Circuit held that if the complaint does not specify the amount of damages sought, and it is not facially

d. District Courts In The Eleventh Circuit Continue To Receive Evidence Submitted After The Notice Of Removal.

While Plaintiff would like to establish a rule barring the defendant from submitting jurisdictional evidence after the filing of a removal notice, the continued reception of such evidence by district courts in the Eleventh Circuit shows that *Lowery* did not establish any such bar.

Thus in *Bartley v. Starwood Hotels & Resorts Worldwide, Inc.*, Civ. A. No. 1:07-CV-1268-RLV, 2007 WL 2774250, at *1 (S.D. Fla. Sept. 24, 2007), the court, citing *Williams*, *supra* note 3 at 1316, explained that "[i]f the jurisdictional amount is unclear in the complaint, courts will look to the notice of removal *as well as any post-removal evidence to determine if the jurisdictional amount was satisfied at the time of removal*." Similarly, in *Fuller v. Home Depot Servs., LLC*, Civ. A. No. 1:07-CV-1268-RLV, 2007 WL 2345257 (N.D. Ga. Aug. 14, 2007), the

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apparent from the complaint that the amount in controversy exceeds the jurisdictional amount, the defendant can satisfy its burden by presenting "summary-judgment-type" evidence relevant to the amount in controversy. *Id*. at 1319. And in holding that any time the jurisdictional amount is not apparent from the face of the complaint, the parties may submit evidence on that issue, the Eleventh Circuit in *Williams* explicitly adopted the approach articulated by the Fifth and Ninth Circuits in *Allen v. R&H Oil & Gas Co.*, 63 F.3d 1326, 1335-56 (5th Cir. 1995), and *Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997), where the plaintiffs contested jurisdiction by filing remand motions. *See also Miedema v. Maytag Corp.*, 450 F.3d 1322, 1330 (11th Cir. 2006) (approving of court considered evidence that the defendant submitted with its brief opposing remand.

Fuller and *Bartley* show that no rule exists barring district courts from considering post-notice evidence of federal jurisdiction. While Plaintiff cites *Thrift Auto Repair, Inc. v. U.S. Bancorp*, No. 1:07-CV-1051-TWT, 2007 WL 2788465 (N.D. Ga., Sept. 21, 2007), for the proposition that post-notice submissions are never permissible, *Thrift*, like *Lowery*, is easily distinguished from the case before the Court. In *Thrift*, the plaintiff filed a class action lawsuit against a bank, alleging that an equipment lease agreement included illegal fees, charges, and taxes. *Id.* at *1. The defendant filed a notice of removal on diversity grounds under CAFA. The court, citing *Lowery*, held that a district court "looks only to the pleadings and may not consider any evidence in deciding whether the preponderance of the evidence standard has been satisfied. *Id.* at *2.

However, in *Thrift*, as in *Lowery*, the nature of the alleged damages precluded the defendant from ascertaining the amount in controversy from either the facts of the complaint or the contract. The *Thrift* court noted that this was not the kind of case that would lend itself to a fair approximation of damages, because

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district court's consideration of defendant's evidence attached to its removal petition).

the contract there did not specify the amounts of the allegedly improper fees and charges. *Id.* at *3. The court concluded it was "simply not possible for the Court to 'look to the contract and determine what those damages would be.'" *Id.* In contrast, Plaintiff's Complaint here seeks, at least in part, damages based on the amounts paid to Microsoft in subscription fees. *See supra* Section II.B.2.b. That provided the direction for Microsoft's review of its records, the results of which enabled Microsoft to make its allegations in the Notice of Removal. There is no basis in *Lowery* or *Thrift* to bar Microsoft from submitting those records with this Memorandum or the Court from considering such evidence.

e. Plaintiff's Suggestion That The Court May Not Consider Evidence From Sources Other Than The Plaintiff Would Undermine Congress's Clear Intent That CAFA Expand Federal Jurisdiction Over Class Action Litigation.

Finally, Plaintiff suggests that on a motion to remand, the Court may consider only facts that are provided by the plaintiff, a suggestion that would bar the defendant from submitting any facts – including facts uniquely in its possession – to carry its burden of establishing federal jurisdiction by a preponderance of the evidence. Pl. Mot. at 8 n.3 (contending that "facts not provided by the Plaintiff are not generally admissible in the remand analysis") (citing *Thrift*, 2007 WL 2788465, at *3). That is simply not the law, and if adopted by this Court would undermine Congress' clear intent to facilitate removal of class actions to federal court by broadening the range of class actions over which federal jurisdiction exists.

The Eleventh Circuit recognized Congress's purpose to expand federal jurisdiction in *Lowery*:

> Congress enacted CAFA to address inequitable state court treatment of class actions and to put an end to certain abusive practices by plaintiffs' class counsel. CAFA § 2, 119 Stat. at 5. CAFA seeks to address these inequities and abusive practices by, among other things, broadening federal diversity jurisdiction over class actions with interstate implications. CAFA § 2, 119 Stat. at 5; *see also Miedema,* 450 F.3d at 1329 ("[T]he text of CAFA plainly expands federal jurisdiction over class actions and facilitates their removal[.]").

Lowery, 483 F.3d at 1193. Plaintiff's suggestion is contrary to this Congressional purpose.

As noted *supra* in Sections II.B.2.b and II.B.2.d, both *Lowery* and *Thrift* recognized that in many cases the amount in controversy is readily deducible from documentary evidence. This occurs, for example, where a contract exists and there is a legal principle, such as expectation damages, that provides a rule for determining the amount in controversy from the face of the document. *See Lowery*, 483 F.3d at 1214 n.66. That evidence, as in the present case, will often be held by the defendant.

In contrast, both *Lowery* and *Thrift* stated that there are cases where the jurisdictional determination cannot be made at the outset of the case. In *Lowery*, the plaintiffs sought compensatory damages for personal injuries, physical pain, mental anguish, and loss of the use and enjoyment of their property. *Lowery*, 483 F.3d at 1188. Those damages were not susceptible of ready determination, upon commencement of the case, by reference to documents in the possession of either side. Therefore the rule in *Lowery*, 483 F.3d at 1214 n.66, authorizing the Court to consider documentary evidence, did not apply. *See also Thrift*, 2007 WL 2788465, at *3 (rejecting application of *Lowery* "contract exception" under facts presented).

In the present case, Microsoft has shown that its records make the amount in controversy "readily deducible." *See supra* Section II.B.2.b. And in this case, it is Microsoft, as the common contracting party with each proposed class member, that is uniquely in possession of the evidence that the jurisdictional minimum is satisfied. In contrast, Plaintiff, as a single Xbox LIVE subscriber, has no means of knowing the number of Xbox LIVE subscribers in Georgia and the amount that those subscribers have paid Microsoft. If the Court accepted Plaintiff's suggestion that Microsoft cannot submit evidence from its own records, it would enable Plaintiff, in a case where federal jurisdiction clearly exists, to prevent Defendant from exercising its removal rights under CAFA and thereby implement Congress' policy of enlarging federal jurisdiction over class action litigation.

And there is a further vice in Plaintiff's suggestion. The plaintiff, as author of the Complaint, is free to include, and to omit, whatever facts he or she wishes, as long as the Complaint otherwise meets the requirements for stating a valid cause of action. If the defendant is barred from submitting any evidence that the plaintiff does not provide, the plaintiff would be able to prevent removal simply by strategically omitting from the Complaint any facts from which the defendant could draft a successful notice of removal. That would encourage precisely the kind of "abusive practices by plaintiffs' class counsel," *Lowery*, 483 F.3d at 1193, that Congress sought to deter by bringing more class actions within the jurisdiction of the federal courts.

In sum, Plaintiff's suggestion that Microsoft may not introduce any facts in support of removal would undermine public policy as expressed by Congress when it enacted CAFA. That cannot be what Congress intended.

III. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion to Remand.

DATED this 24th day of October, 2007.

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L.R. 7.1(D) CERTIFICATION

I hereby certify that Defendant's Motion to Dismiss has been prepared in Times New Roman font, 14 point, pursuant to L.R. 5.1(C).

/s/ Kristy Brown
Kristine McAlister Brown

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2007, I electronically filed the foregoing **MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND** with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

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This 24th day of October, 2007

/s/ Kristy Brown
Kristine McAlister Brown